Supreme Court, U.S.
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Nos. 94-1620, 94-1621

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

WILLIAM KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Date: May 1, 1995

QUESTIONS PRESENTED

I. Whether a state university which formerly excluded blacks but which at least 40 years ago eliminated all policies and practices -- traceable to the segregative era -- which had segregative effects, is nonetheless permitted under the Fourteenth Amendment to provide race-exclusive benefits in order to alter certain blacks' perceptions of the university and alter some black students' voluntary enrollment patterns.

II. Whether a publicly-funded academic scholarship program that is open to all blacks without regard to citizenship, residence, or financial need but that excludes all nonblacks is "narrowly tailored" to eliminating continuing effects of pre-1954 racial discrimination against blacks.

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On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-29a) is reported at 38 F.3d 147. The order of the Court of Appeals denying Petitioners' petitions for rehearing (Pet. App. 30a-33a) is reported at 46 F.3d 147. The opinion and order of the district court (Pet. App. 34a-95a) are reported at 838 F.Sup. 1075.

The case was argued before both the Court of Appeals and the district court on a prior occasion. The first

opinion of the Court of Appeals (Pet. App. 96a-108a) is reported at 956 F.2d 52. The first memorandum and order of the district court (Pet. App. 109a-138a) are reported at 764 F. Supp. 364.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1994. On November 10, 1995, Petitioners filed petitions for rehearing with suggestions for rehearing in banc. Those petitions were denied by an order of the Court of Appeals entered December 30, 1994. The petitions for a writ of certiorari were filed on March 29 and 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case is before the Court for a determination of the legality of the Banneker Program, a non-need-based academic scholarship program operated and funded by the University of Maryland at College Park (UMCP) that sets aside a number of scholarships solely for blacks. Banneker Scholarship recipients receive a four-year, all-expenses-paid grant. Respondent Daniel Podberesky was denied an opportunity to compete for a Banneker Scholarship because he is not black.

Mr. Podberesky was accepted by UMCP in the fall of 1989 and invited to participate in UMCP's selective honors program. He enrolled in the fall of 1990 and graduated Phi Beta Kappa in May 1994 with a 3.8 grade point average ("GPA") and a degree in biochemistry. He is now completing his first year in medical school.

As an applicant to UMCP, Mr. Podberesky's academic credentials were outstanding. He scored 1340 (out of a possible 1600) on the November 1989 Scholastic Aptitude Test (SAT), the standardized test of verbal and mathematical skills taken by virtually all UMCP applicants. As calculated by his high school, his GPA through

his junior year in high school exceeded 4.00 on a scale of 0-4. Mr. Podberesky's active participation in extracurricular and community service programs while in high school demonstrated his tremendous leadership potential.

In conjunction with his application for admission to UMCP in the fall of 1989, Mr. Podberesky asked to be considered for an academic scholarship. UMCP has maintained two merit-based, academic scholarship programs that are the focus of this case: the Banneker Program and the Francis Scott Key Scholars Program (the "Key Program").[1] The Banneker Program provides benefits to each scholarship winner worth about $35,000 for in-state students (and considerably more for those from out of state), covering full financial support for four years of college, including tuition, room, board, book expenses, fees, and other benefits. The Key Program provides virtually identical benefits. Most recently, roughly 30 Banneker Scholarships and 30 Key Scholarships have been awarded each year.[2]

Scholarships are awarded under the Banneker and Key programs to academically talented students without regard to their parents' financial resources. Incoming UMCP students receive consideration for such scholarships if and only if their SAT scores and high school GPAs meet cer-

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[1] Funds for the Key and Banneker Programs have come from the same pool of state and tuition money and have been split on a 50-50 basis. Court of Appeals Joint Appendix ("J.A.") 566-67. State desegregation funds play a very small role in Banneker funding.

[2] Following the Court of Appeals's denial of the petitions for rehearing, UMCP announced that, pending completion of appeals in this case, it was combining the two programs into a new academic scholarship program to be known as the Banneker-Key Program. About 60 scholarships are to be awarded annually under this new program, with race to be taken into account as one factor in the award of scholarships. *See* "Banneker's future affected by many," *The Diamondback*, at 1 (April 13, 1995). UMCP stated that it would reestablish the Banneker Program should it ultimately prevail in this litigation. *Id.*

tain pre-established minimums; these minimum requirements are set high enough so that only a small group of students meet the minimums and receive further consideration for scholarship awards. Mr. Podberesky's SAT score and high school GPA placed him just below the threshold for further consideration under the Key Program. Pet. App. 99a n.2.

On the other hand, his academic credentials far exceeded those required for further consideration under the Banneker Program; the minimum requirements for further consideration under the Banneker Program were a 900 SAT score and a 3.0 GPA. Pet. App. 99a. Nonetheless, Mr. Podberesky was not considered for a Banneker Scholarship because he failed to meet an additional requirement applicable to the Banneker Program (but not the Key Program): Banneker Scholarships are awarded only to blacks, and Mr. Podberesky is Hispanic. Mr. Podberesky protested to UMCP officials that the setting aside of financial aid funds for members of only one race violated his constitutional rights, but he failed in his efforts to receive further consideration for any of UMCP's merit-based scholarships.

Proceedings Below. Mr. Podberesky filed suit in federal district court in Baltimore against UMCP and its President, William E. Kirwan (the "Kirwan Petitioners"), on June 22, 1990. The complaint alleged that by refusing to consider Mr. Podberesky for a Banneker Scholarship because of his race, Petitioners violated 42 U.S.C. § 1983 (by denying him his Fourteenth Amendment rights to due process and equal protection under the law); the Civil Rights Act of 1866, 42 U.S.C. § 1981; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Mr. Podberesky requested, *inter alia*, that UMCP be enjoined from continuing to operate the Banneker Program in a racially discriminatory manner, and that it be ordered to fully consider him for a Banneker Scholarship without regard to his race.

The parties filed cross motions for summary judgment in January and February, 1991. Petitioners' motion raised only one argument in defense of their racially exclusionary financial aid policy: the need to eliminate the alleged vestiges of Maryland's former dual education system. The motion did not defend the policy based on an alleged compelling need to establish a racially diverse student body.

In an order dated May 15, 1991, the district court granted Petitioners' motion for summary judgment and denied Mr. Podberesky's cross motion. Pet. App. 138a. The court stated that the Banneker Program should be evaluated under a "strict scrutiny" standard, thereby requiring UMCP to demonstrate a "compelling interest" in the program in order to justify its continuation. Pet. App. 121a-122a. The court then held that the program could withstand "strict scrutiny" analysis; it held that Petitioners had a compelling interest in continuing the Banneker Program as a remedial measure necessary to eliminate vestiges of Maryland's former dual education system. Pet. App. 130a. Without directly addressing what "present effects" of past discrimination continued to exist at UMCP, the court said, "[T]he effects of longstanding discrimination are pervasive, and there is ample evidence in the record before me to support the view of UMCP officials that it is premature to find that there are no present effects of past discrimination at the university." *Id.* The district court went on to hold that the Banneker Program was sufficiently "narrowly tailored" to eliminate the vestiges of Maryland's former dual education system. Pet. App. 130a-133a.

Mr. Podberesky appealed both from the grant of Petitioners' summary judgment motion and from the denial of his own summary judgment motion. In an Opinion dated January 31, 1992, the Court of Appeals reversed the May 15, 1991 Order and remanded the case to the district court. Pet. App. 96a-108a.

The Court of Appeals noted that all parties recognized that UMCP had a history of racial discrimination against

blacks but that the discrimination had ended years before Mr. Podberesky sought a Banneker Scholarship in 1990. The court held that a state attempting to justify a racial preference program on remedial grounds must do much more than present evidence of past discrimination against the currently-favored group, particularly when the past discrimination ended other than in the immediate past:

> [I]n order to justify a race-based remedy in a case where identifiable discrimination occurred a number of years in the past, a finding of such discrimination is not sufficient. There must be some present effect of this past discrimination that the program is designed to redress.

Pet. App. 106a.

The Court of Appeals held that the district court erred in granting summary judgment for Petitioners in the absence of an explicit finding of such present effects and added that "no such evidence of present effects was brought to our attention *nor is it part of the record.*" Pet. App. 107a (emphasis added). The Court of Appeals directed the district court to make:

> [A] determination as to the present effects of past discrimination at UMCP. Should no further evidence be available upon remand, summary judgment for [Mr. Podberesky] would be appropriate.

Pet. App. 108a.

On remand, the district court denied Mr. Podberesky's request for an immediate hearing on his pending summary judgment motion. Instead, it granted Petitioners' request for a lengthy delay in proceedings to permit them an

opportunity to investigate present effects of past discrimination at UMCP.[3]

By order dated November 18, 1993 (as amended November 22, 1993), the district court granted Petitioners' motions for summary judgment and denied Mr. Podberesky's renewed motion for summary judgment. Pet. App. 95a. The district court found *as a matter of law* that there was "strong evidence" to support Petitioners' contention there exist present effects of UMCP's past racial discrimination in at least four areas: (1) UMCP's allegedly poor reputation among Maryland blacks; (2) alleged "underrepresentation" of blacks in the UMCP student body; (3) lower retention rates for blacks than for nonblacks; and (4) "perceptions of a college campus that is hostile to African-Americans." Pet. App. 52a. The district court further found *as a matter of law* that the Banneker Program was "narrowly tailored" to eliminating those alleged present effects of UMCP's past racial discrimination. Pet. App. 81a-88a.[4]

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[3] In July 1992, the district court also granted a motion to intervene filed by a group of UMCP students then receiving Banneker Scholarships and a group of black Maryland high school students who hoped to receive Banneker Scholarships in the future (the "Greene Petitioners").

[4] Given the case's posture at the time the district court issued its decision (cross-motions for summary judgment), the district court erred -- as the Court of Appeals noted (Pet. App. 18a) -- by resolving disputed factual issues and entering lengthy factual findings that essentially mirrored Petitioners' view of the case. In their Statement of the Case, the Kirwan Petitioners cite repeatedly to the "findings" of the district court and suggest that those "findings" are synonymous with the record evidence. That suggestion, of course, is incorrect as a matter of law.

Indeed, many of the district court "findings" upon which Petitioners rely have no evidentiary basis whatsoever. Space does not permit Mr. Podberesky to point out all the unfounded claims included in Petitioners' Statements of the Case, but a few merit mention. In particular, the district court's and Petitioners' accounts of federal

(continued...)

Mr. Podberesky appealed to the Court of Appeals from the denial of his own motion for summary judgment and the grant of summary judgment to Petitioners. In an Opinion dated October 27, 1994, the Court of Appeals vacated the district court's judgment and remanded with instructions that summary judgment be entered for Mr. Podberesky. Pet. App. 1a-29a.

The Court of Appeals held that the district court erred in granting summary judgment to Petitioners, because Mr. Podberesky had submitted considerable evidence that no

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[4] (...continued)
government involvement in Maryland desegregation efforts are wildly distorted: (1) the Office for Civil Rights (OCR) of the U.S. Department of Health, Education & Welfare *never* issued any formal findings that Maryland's higher education system was not in compliance with Title VI; (2) the 1985-89 higher education desegregation plan submitted by Maryland to OCR (Exhibit 8 to Respondent's 1991 summary judgment motion) made no reference (either direct or indirect) to the Banneker Program (either to the modest program that was open to other racial minorities in 1985 or to the vastly expanded, blacks-only version of the program adopted in 1988), and thus OCR's acceptance of that plan cannot be construed as OCR endorsement of the Program; (3) the 1985-89 plan is irrelevant in any event, because it was no longer in effect during the years at issue in this lawsuit; and (4) while OCR (in connection with its Title VI enforcement responsibilities over all U.S. colleges and universities) is currently reviewing UMCP's compliance with Title VI, Petitioners are off base in suggesting (Kirwan Pet. at 11) that Maryland will not have "achieved [Title VI] compliance" until the review is complete.

Petitioners have also omitted numerous relevant statistics regarding integration at UMCP, including: (1) UMCP's black enrollment rate is the second highest among major state universities and has been steadily increasing for 25 years (Pet. App. 11a-12a), and it consistently ranks among the top three historically white universities in terms of the number of African Americans graduating each year (J.A. 820, 710, 973); (2) the differential between white and black graduation rates at UMCP is significantly smaller than the differential at NCAA Division I schools taken as a group (Addendum to Respondent's March 24, 1994 Fourth Circuit Reply Brief); and (3) UMCP administrators vigorously deny that the school has discriminated against blacks in any way during the past two decades (J.A. 2848-9, 2854-5), and the Greene Petitioners do not allege otherwise.

vestiges of UMCP's past racial discrimination remained on the UMCP campus. Pet. App. 18a. The Court of Appeals further held that two of the four alleged vestiges of past discrimination cited by the district court (UMCP's allegedly poor reputation among Maryland blacks and alleged non-institutional racial hostility on the UMCP campus) are insufficient to justify race-exclusive remedial action. Pet. App. 10a. The court stated:

> [A]ny poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students [beginning in 1954]. There is no doubt that many Maryland residents, as well as some citizens in other States, know of the University's past segregation, and that fact cannot be denied. However, mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy.

Id.[5]

Finally, with respect to the other two vestiges alleged by Petitioners (alleged "underrepresentation" of blacks on the UMCP campus, and lower retention rate for blacks than for whites), the Court of Appeals held as a matter of law that the Banneker Program was not "narrowly tailored" to remedying those alleged vestiges. Pet. App. 19a. In particular, the court found that Petitioners had failed to demonstrate that those alleged vestiges could not be remedied in a race-neutral manner. Pet. App. 26a-27a.

On December 30, 1994, the Court of Appeals denied Petitioners' motions for rehearing with suggestions for rehearing in banc. Pet. App. 30a-33a. The Kirwan Peti-

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[5] The Court rejected the "racial hostility on campus" argument on the additional ground that Petitioners had presented no evidence that the alleged hostility was causally related to UMCP's previous discriminatory acts. Pet. App. 11a.

tioners and the Greene Petitioners filed separate certiorari petitions on March 29 and 30, 1995.

SUMMARY OF ARGUMENT

The court below struck down -- as a violation of Title VI and the Fourteenth Amendment's Equal Protection Clause -- UMCP's blacks-only scholarship program, ostensibly established for the purpose of remedying the school's past racial discrimination against blacks. Several factors counsel against this Court's review of the decision.

First, no other appellate court has addressed the propriety of such scholarship programs. That means, of course, that there is no direct conflict between the Fourth Circuit's decision and any other appellate decision. The allegedly conflicting decisions pointed to by Petitioners present fact patterns bearing little resemblance to this case. All of those decisions predate this Court's seminal affirmative action decisions, and most do not even arise within the context of higher education.

Second, although hundreds of colleges and universities administer race-based scholarship programs, it is not at all clear that those programs, because of their disparate criteria and justifications, will be affected by the Fourth Circuit's decision. Determining whether the factual predicates for a race-based scholarship program exist at a particular school is necessarily a fact-intensive exercise; the Fourth Circuit's decision that UMCP failed to establish those predicates does not prevent other schools from doing so. Moreover, the rationale behind the great majority of race-based scholarship programs in this country -- a desire to diversify the student body -- is not addressed by the Fourth Circuit's decision.

In any event, the Fourth Circuit's decision was virtually mandated by this Court's precedents. In *United States v. Fordice*, 112 S. Ct. 2727 (1992), the Court held that a state with a history of *de jure* segregated higher education must dismantle that system by: (1) adopting a

race-neutral admission policy; and (2) eliminating "to the extent practicable and consistent with sound educational practices" those policies traceable to the prior system that have discriminatory effect. *Fordice*, 112 S. Ct. at 2736. The undisputed record in this case demonstrates that Maryland and UMCP have long since fulfilled their obligations under *Fordice*. Accordingly, UMCP lacked any compelling reason to attempt to further "remedy" the effects of the pre-1954 segregated higher education system by adopting a racially discriminatory scholarship program.

Finally, Petitioners' claim that the Banneker Program served UMCP's compelling interest in a racially diverse student body is without support and is not properly presented for review. That claim has not been passed on by any of the federal courts that have considered this case. More importantly, Petitioners failed to raise that claim in response to Mr. Podberesky's initial motion for summary judgment and thus should not be permitted to raise it at this late date. Moreover, to the extent record evidence does exist, it indicates that achieving diversity was not in fact the reason UMCP adopted the Banneker Program.

REASONS FOR DENYING THE PETITIONS

In striking down a state-sponsored scholarship that discriminates on the basis of race, the Fourth Circuit was simply following clear-cut authority from this Court. A long line of decisions from the Court makes clear that programs that discriminate on the basis of race are highly disfavored under the law. Moreover, the decision below does not conflict with decisions from any other federal appellate court. The Court should deny the petitions.

Racial classifications are a "highly suspect tool" that reviewing courts should uphold only under extremely limited circumstances. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989)(plurality opinion); *id.* at 520 (Scalia, J.). That is so because, "Classifications of citizens solely on the basis of race 'are by their very

nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993)(quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The Court is also mindful of the potential harmful effect of even the most remedial of racial classifications: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno*, 113 S. Ct. at 2832.

Petitioners' establishment of a racially exclusive scholarship fund is no less suspect because it is employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority. *Croson*, 488 U.S. at 494 (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 295-99 (1978)(Powell, J.). *Shaw v. Reno* puts to rest any argument that the Court will treat deferentially racial classifications that favor groups that suffered from past discrimination. In a decision that called into question the constitutionality of drawing congressional districting lines according to the race of constituents, the Court said:

> [T]he dissent argues that racial gerrymandering poses no constitutional difficulties when lines are drawn to favor the majority. . . We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S., at 494 (plurality opinion); see also *id.*, at 520 (Scalia, concurring in judgment). Accord *Wygant* [*v. Jackson Board of Education*], 476 U.S. [267,] 273 [(1986)] (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Shaw v. Reno, 113 S. Ct. at 2829.

Petitioners' attempts to distinguish *Croson, et al.*, are unavailing. They argue that "[t]he standards set out in *Croson* and *Wygant* . . . are inapplicable in this case" because in those cases, unlike this one, the allegedly remedial racial classifications were adopted "in the absence of any findings of discrimination." Kirwan Pet. at 17. That view of the law is a clear misreading of *Croson* and *Wygant*. Those decisions make clear that it is not the mere historical fact of past discrimination that triggers a state interest in remedial schemes; rather, the focus should be on whether there exist *present effects* of past racial discrimination. *Wygant*, 476 U.S. at 274 (plurality opinion). In the absence of such present effects, there can be no justification for race-conscious remedial measures. *Id.* Nothing in the language of *Croson* or *Wygant* supports Petitioners' contention that a finding of past discrimination lessens a state's heavy burden in attempting to justify a racial classification.[6]

I. THE DECISION BELOW WAS MANDATED BY THIS COURT'S *FORDICE* DECISION

Petitioners contend that the decision below overlooked and is inconsistent with this Court's case law regarding a state's affirmative obligation to take steps to eliminate vestiges of *de jure* segregated systems of education. Kirwan Pet. at 14-21; Greene Pet. at 17-20. That contention is without merit.

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[6] Moreover, *Croson* is *not* factually distinguishable from this case. While all parties agree that UMCP excluded black students prior to 1954, the evidence of past discrimination against blacks was no less strong in *Croson*. That case involved government contracts set aside solely for minority-owned businesses by the City of Richmond, the capital of the Confederacy during the Civil War. Richmond had a centuries-long history of *de jure* discrimination against African Americans that continued well beyond 1954. *Croson* nonetheless imposed exacting scrutiny on Richmond's "remedial" set-aside program and focused exclusively on the *present effects* of past discrimination.

In *United States v. Fordice*, 112 S. Ct. 2727 (1992), a case in which the federal government was challenging the adequacy of Mississippi's desegregation efforts, the Court explained what a state must do in order to eliminate the vestiges of a *de jure* segregated higher education system. In addition to adopting a race-neutral admission policy, a state with a history of segregated higher education must also eliminate "to the extent practicable and consistent with sound educational practices" those policies traceable to the prior system that have discriminatory effect. *Fordice*, 112 S. Ct. at 2736. The Court explained:

> If the state perpetuates policies and practices traceable to its prior system that continue to have segregative effects -- whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system -- and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.

Id. at 2737.

Fordice dictates that this case focus on UMCP "policies" or "practices" that are having segregative effects. Once the issues are focused in that manner, Petitioners' case collapses. Petitioners have never identified a single UMCP "polic[y]" or "practice[]" traceable to the pre-1954 era that has or has had segregative effects. Even the district court found that UMCP has maintained race-neutral admissions procedures since 1954. Accordingly, UMCP has at all times since 1954 done all that is required of it under *Fordice*. Moreover, if there were such "policies" or "practices," *Fordice* dictates that they be

eliminated, not that UMCP adopt racially discriminatory programs designed to overcome their segregative effects.[7]

Petitioners' reliance on *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and other cases dealing with steps necessary to desegregate elementary and secondary schools (*see* Kirwan Pet. 15-17), is misplaced. The Court held in *Fordice* that dismantling formerly segregated institutions that obtain their participants through the voluntary choices of individual participants (a category that includes colleges and universities) does not require the broad-based affirmative remedies outlined in elementary/secondary school cases such as *Green*. *Fordice*, 112 S. Ct. 2736-37. Rather, a state's only obligation in the area of higher education is to eliminate un-

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[7] Appellees cite *Knight v. Alabama*, 14 F.3d 1534, 1553 (11th Cir. 1994), for the proposition that a university harboring a racially hostile climate that has segregative effects and that is traceable to the segregative era is bound by *Fordice* to take steps to remedy that climate. Mr. Podberesky submits that that *dictum* in *Knight* is a clear misreading of *Fordice*; it is difficult to conceive how a campus climate could be considered to be a "policy" or "practice" of a university. *Fordice* might require a university to eliminate policies or practices (dating from the segregative era) that foster a racially hostile campus climate, but the climate itself is not something a university can control as a matter of "policy."

In any event, nothing in *Knight* is contrary to the result reached by the court below. *Knight* declined to order a remedy against Alabama based on the plaintiffs' "racially hostile campus" allegation, finding that the state was "doing all that [it could] practicably do" to address the issue through a variety of race-neutral programs designed to ease racial tensions (such as "symposia, student activities and services and university sponsored commemorations of the Civil Rights Movement and its leaders"). *Knight*, 14 F.3d at 1553. Since the Eleventh Circuit believed that Alabama could not be required to do more than it was doing to ease racial tensions, it clearly would not have condoned use of race-exclusive remedies (such as the Banneker Program) as a "narrowly tailored" means of achieving that goal.

warranted "policies and practices traceable to its prior system that continue to have segregative effects." Id.[8]

The instant case is factually distinguishable from *Fordice* in one respect: *Fordice* addressed the steps constitutionally *required* of a state in dismantling a segregated higher education system, while this case concerns the propriety of "remedial" actions *voluntarily* undertaken by UMCP. *Croson* makes clear, however, that that distinction is of little moment. A state may implement a voluntary race-based "remedial" program only if there exists a "strong basis in evidence" that remedial action is constitutionally required and only if the program is narrowly tailored to achieving its remedial goals. *Croson*, 488 U.S. at 507-508. Petitioners cannot begin to make the showing required under *Croson* in the absence of any evidence of the types of "policies" or "practices" identified in *Fordice*.

In light of *Fordice*, there is no basis for challenging the appeals court's holding that two of the four alleged continuing effects of past UMCP discrimination -- UMCP's allegedly poor reputation within Maryland's African American population and its allegedly racially hostile campus climate -- are insufficient as a matter of law to justify a race-based remedial program. As the appeals court noted (Pet. App. 10a), it will always be a historical fact that UMCP discriminated against blacks prior to 1954; thus, there is no way that UMCP can "remedy" knowledge of that fact other than to erase history. If a black Maryland high school senior chooses not to attend UMCP because he/she wishes not to be associated with a school that used to exclude blacks 40 years ago, that is an individual choice that is beyond UMCP's control. Certainly, nothing in the record suggests that UMCP has any

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[8] *See also Bazemore v. Friday*, 478 U.S. 385, 387-88 (1986)(4-H and Homemaker Clubs, which rely solely on voluntary choices of individuals in obtaining members, have taken sufficient remedial action to remove all vestige of the formerly segregated club operations when they implement "voluntary choice" membership policies).

"policies" or "practices" that foster increased public awareness of UMCP's segregated past.[9]

Case law cited by Petitioners stands for the proposition that, in the period immediately after racial exclusion is ended, race-conscious remedies may be warranted in order to overcome reputational barriers that otherwise would discourage blacks from applying for positions they affirmatively seek. *See, e.g., Sheet Metal Workers v. EEOC*, 478 U.S. 421, 477 (1986) (plurality opinion).[10] Nothing in *Sheet Metal Workers* stands for the proposition that such remedies are warranted -- 40 years after racial discrimination has ended -- for the purpose of attracting black applicants to a school which they otherwise might not have considered attending. Moreover, the federal courts of appeals are unanimous in rejecting evidence of a reputation for discrimination in the distant past as sufficient justification for a race-based remedial program. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994); *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987), *reh. denied*, 826 F.2d 73, 76-77 (D.C. Cir.), *cert. denied*, 486 U.S 1036 (1988).

The appeals court's refusal to consider evidence regarding the allegedly hostile racial climate at UMCP is

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[9] There is also no evidence that UMCP has "policies and practices traceable to its prior [segregated] system" that cause the alleged underrepresentation of blacks or UMCP's black/white retention rate differential.

[10] The *Sheet Metal Workers* plurality permitted race-based remedies for racial discrimination that ended in the immediate past because, in the absence of race-based remedies, blacks who wished to become union members would have faced impediments in simply gaining access to the membership-signup process, and would have been "discourage[d] . . . from even applying for membership" based on a belief that any application would be rejected for racially discriminatory reasons. *Id.* In contrast, Petitioners have presented no evidence that black Marylanders believe that UMCP still discriminates against blacks in the admissions process.

similarly unobjectionable. There is no allegation that the allegedly hostile climate is fostered in any way by policies or practices of UMCP's administration; in the absence of such an allegation, *Fordice* counsels that UMCP has no interest in altering that climate sufficiently compelling so as to justify a race-exclusive remedy. *Fordice*, 112 S. Ct. at 2736-37. As the lower court noted, to permit Petitioners to employ racially discriminatory remedies in order to counteract racial hostility allegedly perceived by African Americans at UMCP -- a hostility similar to that perceived by blacks nationwide, on and off college campuses[11] -- would amount to nothing more than employing race-based remedies to confront general societal discrimination. This Court has never permitted race-based remedies to be used for that purpose. *See, e.g., Wygant*, 476 U.S. at 276 (plurality opinion).

II. THE DECISION BELOW WAS FULLY CONSISTENT WITH CASE LAW REGARDING "NARROWLY TAILORED" REMEDIES

The court below directed entry of summary judgment for Mr. Podberesky on the ground that Petitioners had failed to meet their evidentiary burden of demonstrating that the Banneker Program was "narrowly tailored" to eliminating present effects of past racial discrimination at UMCP. Pet. App. 18a-28a. That holding was fully consistent with the evidence and this Court's case law.

In particular, the court below found the Banneker Program deficient due to Petitioners' failure to sufficiently consider race-neutral alternatives to the program. *Id.* at 27a. This Court has repeatedly emphasized the importance of limiting race-exclusive "remedies" to those few situations in which race-neutral alternatives are unavailable. *Croson*, 488 U.S. at 507; *United States v. Paradise*, 480 U.S. 148, 171-177 (1987)(plurality

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[11] *See, e.g., Ayers v. Fordice*, No. 4:75CV009-B-O, ___ F. Supp. ___ (N.D. Miss. Mar. 7, 1995)(slip op. at 72).

opinion). As the Fourth Circuit recently held, in the context of the City of Charlotte police department's race-based promotion program:

> The essence of the "narrowly tailored" inquiry is the notion that explicit racial preferences, if available at all, must be only a "last resort" option. Without evidence that the City considered race-neutral alternatives to achieve diversity, or that the use of a nondiscriminatory policy would not achieve its goal, we simply cannot hold that the City's promotion policy was narrowly tailored.

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993). *Hayes* explained that any race-preference policy not adopted as a "last resort" is improper, regardless that the burden imposed on third parties by the preference policy might not be large. *Id.*

Each of the goals that Petitioners sought to achieve through the Banneker Program could have been achieved by race-neutral means. If the alleged "present effect" of past discrimination is a negative reputation of UMCP among Maryland blacks, then there are a whole host of race-neutral, public relations-oriented means of counteracting that reputation. Moreover, programs that discriminate on their face on the basis of race are unlikely to be effective in convincing blacks that UMCP has eliminated racial discrimination.

If the alleged "present effect" is the racial climate at UMCP, the narrowly tailored response would be a race-neutral campus program designed to reduce and address "racial incidents" on campus and to promote understanding among students of different races. The Banneker Program -- by stigmatizing blacks and promoting resentment among nonblack students (*see, e.g.*, J.A. 2979) -- has precisely the wrong effect. As Justice Powell recognized in *Bakke*:

> All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be

> viewed with deep resentment by the individuals burdened. . . One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies a system of allocating benefits and privileges on the basis of skin color and ethnic origin.

Bakke, 438 U.S. at 294 n.34 (Powell, J.).[12]

If the alleged "present effect" is lower retention and graduation rates at UMCP for blacks than for whites, then the narrowly tailored (and only effective) remedy is to eliminate the causes of the conditions that lead to the lower rates, including lack of finances to continue in college and academic difficulties. Such a remedy would entail awarding need-based scholarships to those successfully pursuing a college education, and devoting additional funds to tutoring and counseling.[13] The non-need-based Banneker Program does neither. It may attract academically talented (usually middle or upper class) black students who are likely to graduate from whatever college they attend, but any resulting increase in UMCP graduation and retention rates would be no more than window dressing for the school; it would be unrelated to UMCP's current (allegedly) low graduation and retention rates among blacks.

Even within the context of merit-based scholarship programs, there are more narrowly tailored alternatives to

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[12] To the extent that black enrollment at UMCP is a function of its reputation and racial climate, implementing the race-neutral steps outlined above for improving UMCP's reputation and climate would also remedy any alleged "underrepresentation" of blacks at UMCP.

[13] As the Fourth Circuit recognized, the evidence demonstrated that the factors most likely to lead to students dropping out of UMCP were: (1) living off campus with a long commute; (2) having a job with long hours; and (3) having to provide one's own living expenses. Pet. App. 26a. When those factors are controlled for, the attrition rate is no higher for blacks than for whites. *Id.*

the Banneker Program.[14] Indeed, following the Fourth Circuit's ruling in this case, UMCP was able to identify a significant number of high-achieving African Americans to whom to award merit-based scholarships even though it no longer sets aside scholarships exclusively for members of one race.[15] A race-exclusive Banneker Program is constitutionally indefensible in light of UMCP's demonstrated ability to accomplish its allegedly remedial goals without resort to racial set-asides.

The Fourth Circuit rightly faulted the Banneker Program for its sole focus on high-achieving black students. Pet. App. 20a. The evidence is uncontested that UMCP has not discriminated in any way against the past two generations of black high school students. Moreover, the evidence indicates that high achievers, whether African Americans or not, experience high retention and graduation rates at UMCP. Accordingly, even if lower graduation rates among black Marylanders at UMCP were found

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[14] Administrative inconvenience was the only reason given by UMCP for not implementing a race-neutral academic scholarship program that takes into account a wide variety of academic factors -- but downplays reliance on GPAs and SAT scores, two areas in which the disparity between top black candidates and top white candidates is huge. J.A. 2893-94. But this Court has made clear that administrative inconvenience is not an adequate reason to reject a more narrowly tailored, race-neutral remedy.

[15] Pending a final ruling from this Court, UMCP has combined its two merit-based scholarship programs into a new program called the Banneker-Key Scholarship Program. According to a recent issue of *The Diamondback*, UMCP's student newspaper, blacks constitute 40% of the 65 incoming freshmen awarded four-year Banneker-Key Scholarships in 1995. *See* "Banneker's future affected by many," *The Diamondback*, at 1 (April 13, 1995). In selecting Banneker-Key awardees, UMCP takes race into account as one factor among many for the purpose of obtaining a diverse group of awardees, but no scholarships are set aside exclusively for members of any racial group. *Id.* UMCP's ability to locate so many deserving, high-achieving black candidates without resorting to racial set-asides is particularly significant given that blacks constitute only about 15% of UMCP's applicant pool.

to be evidence that past discrimination is having a continuing effect, the Banneker Program does nothing to assist those suffering from the continuing effects and thus cannot be said to be narrowly tailored to remedying those effects.

Petitioners complain that the Fourth Circuit's ruling "conflicts with the well-settled principle that race-based relief may benefit 'individuals who were not the actual victims of a defendant's discriminatory practices.'" Kirwan Pet. at 21 (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986)). Petitioners err; there is no conflict. While a race-based remedial program will not automatically be held unconstitutional merely because the group benefited includes some who are not themselves the victims of past racial discrimination, the Court has made clear that a "narrowly tailored" remedy is one that "tailor[s] remedial relief to those who truly have suffered the effects of prior discrimination." *Croson*, 488 U.S. at 508. In this case, UMCP made no effort to tailor its remedy in that manner, but rather confined race-based benefits to those African Americans (predominantly high-achieving, middle or upper-income blacks) *least* likely to be suffering effects from UMCP's pre-1954 exclusion of blacks.[16]

Petitioners also argue that race-exclusive remedial programs are not even subject to a "narrowly tailoring" requirement when, as Petitioners contend is the case here, "the rights of third parties are not appreciably affected." Kirwan Pet. at 19. Petitioners are wrong on both the law and the facts. The Court has made clear that the Fourteenth Amendment requires *all* state action "that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling government interest" (*Shaw*, 113 S. Ct. at 2816), without

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[16] African Americans living outside Maryland are also highly unlikely to be suffering effects from UMCP's pre-1954 exclusion of blacks; yet, in 1992 (the last year for which information is available in the record) 17 of 31 Banneker Scholarships went to nonresidents of Maryland, and scholarships have even been offered to noncitizens.

regard to the "burden or benefit" imposed thereby on members of various racial groups (*id.* at 2829).

Moreover, the evidence in this case establishes that Mr. Podberesky and others were substantially burdened by the race-exclusive nature of the Banneker Program. The Banneker Program provides an extremely valuable scholarship; it would have been worth about $35,000 to Mr. Podberesky over his four years at UMCP, and is now worth nearly $60,000 to students from outside Maryland. UMCP has all but conceded that Mr. Podberesky (in light of his stellar academic qualifications) would have been awarded a Banneker Scholarship had he been black instead of Hispanic. Accordingly, Mr. Podberesky's race-based exclusion from the Banneker Program -- a program that awarded about 50% of all academic scholarship funds offered by UMCP -- was no small matter. Furthermore, all UMCP students were substantially burdened by the Banneker Program, since its $1.2 million annual cost came directly from UMCP funds, funds that are raised in large measure through student tuition charges.[17]

Petitioners also insist that the Banneker Program is similar to "other race" scholarship programs operated in other states,[18] and that the Court should grant review because the Fourth Circuit's decision calls into question the constitutionality of all such programs. Greene Pet. at 23-24. Petitioners' claim is false; the Banneker Program

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[17] Petitioners' claims that Banneker Program funds make up a small fraction of all financial aid at UMCP fail to point out that the vast majority of that aid is provided by the federal government and is need-based. If such aid and athletic scholarships are not considered, the Banneker Program accounts for a significant percentage of scholarship outlays by UMCP.

[18] An "other race" scholarship program is one that makes financial aid available to students without regard to race, provided only that the student use the funds at a school where a majority of students are of another race. Thus, whites could use "other race" grants only at Historically Black Institutions (HBIs), and blacks could use "other race" grants only at Historically White Institutions (HWIs).

is not an "other race" scholarship program as that term is commonly understood, and thus this case does not provide an opportunity for the Court to decide whether such programs can withstand Fourteenth Amendment scrutiny.

We note initially that although the State of Maryland appears to operate an "other race" program, the record indicates that UMCP does not obtain any funding under that program for Banneker Scholarships, but rather finances the Banneker Program from general operating funds. Moreover, an "other race" program cannot pretend to qualify as race-neutral unless all students have an equal opportunity to compete for available funds without regard to their race. That result can only be achieved if funding is awarded on a state-wide basis. The UMCP-funded Banneker Program does not meet that requirement. In failing to consider Mr. Podberesky for a Banneker Scholarship, UMCP denied him the chance to compete for one of about 30 four-year, all-expenses-paid grants worth about $35,000 each -- a scholarship opportunity that is without parallel at any of Maryland's four HBIs.

In sum, the Fourth Circuit's finding that the Banneker Program is not "narrowly tailored" is fully consistent with this Court's case law.

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY RECENT APPELLATE DECISIONS

Petitioners contend that the decision below conflicts with several other federal appellate decisions. Other than the inconsequential conflict with *dicta* from an Eleventh Circuit decision cited in Note 7, that simply is not true.

Mr. Podberesky notes initially that most of the other appellate decisions upon which Petitioners rely did not arise within the context of higher education. A determination regarding whether a racial preference can withstand strict scrutiny is, of necessity, highly fact specific; thus, it is somewhat disingenuous to assert that the Fourth Cir-

cuit's holding "conflicts" with decisions that did not even arise within a similar factual setting.

Petitioners cite two employment discrimination decisions (both more than two decades old) for the proposition that race-exclusive remedies are justified for the purpose of eliminating an employer's "poor reputation in the black community." Kirwan Pet. 24-25. *See Murrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.)(en banc), *cert. denied*, 419 U.S. 895 (1974); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Neither decision conflicts with the decision below. *Murrow* and *Carter* presage *Sheet Metal Workers* in holding that, in the immediate aftermath of the elimination of rules barring employment of blacks, race-conscious remedies may be warranted in order to overcome reputational barriers that otherwise would discourage qualified blacks from applying for jobs because they assume their applications would not be considered.

Neither *Carter* nor *Morrow* suggests that race-conscious remedies may be continued *indefinitely* for the purpose of overcoming reputational barriers.[19] Moreover, the reputational barriers at issue in those cases are not at all similar to the reputational "barriers" relied on by Petitioners. There is no allegation in this case that Maryland blacks are reluctant to apply to UMCP because they perceive that their applications will not be considered fairly.[20] Rather, Petitioners allege that some Maryland

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[19] *Carter* and *Morrow* are fully consistent with more recent case law that questions whether courts should ever attempt to trace a causal relationship between racially discriminatory acts in the distant past and alleged present effects of those acts. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir.1993), *cert. denied*, 114 S. Ct. 1190 (1994).

[20] Indeed, such a perception would be surprising, because the evidence demonstrates that blacks are afforded a tremendous preference in the UMCP admission process. For example, in 1990, 108 of 204 blacks (53%) with SAT scores between 750 and 800 were admitted, (continued...)

blacks are reluctant to attend UMCP because it used to exclude blacks and because they might not feel comfortable attending a school whose student body is overwhelmingly white. Nothing in *Carter* or *Murrow* supports use of race-exclusive remedies as a means of overcoming that sort of reputational "barrier."

Petitioners also allege that, in contrast to the court below, "the Eighth, Eleventh, and Sixth Circuits have upheld the validity of race-based remedial action implemented under circumstances virtually identical to those under which the Banneker Program arose." Kirwan Pet. 26. None of the three decisions cited by Petitioners (which pre-dated *Fordice, Croson,* and other landmark Supreme Court decisions regarding race-based remedial action) conflict with the Fourth Circuit's decision. In *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), the Sixth Circuit upheld a consent decree mandating race-conscious remedial action in Tennessee's higher education system. The procedural posture of that case serves to distinguish it; it involved the validity of a consent decree, an issue not present here. The Sixth Circuit based its decision in part on an unwillingness to overturn a settlement supported by all parties after 16 years of litigation (*Geier*, 801 F.2d at 809) and in part on its deference to detailed district court factual findings that identifiable vestiges of past discrimination remained within the Tennessee university system.[21] Moreover, the Sixth Circuit's later decision in *Brunet* makes clear that *Geier* should not

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[20] (...continued)
while only 10 of 197 whites (5%) with SAT scores in the same range were admitted. In the same year, 292 of 488 blacks (60%) with GPAs between 2.00 and 2.49 were admitted, while only 531 of 1803 whites (29%) with GPAs in the same range were admitted. J.A. 530.

[21] The Sixth Circuit's decision was also based on a holding that higher education desegregation litigation was controlled by *Green* and other Supreme Court case law addressing desegregation of elementary and secondary schools. *Id.* at 804. This Court's subsequent decision in *Fordice* makes clear that the Sixth Circuit erred in that respect.

be read as countenancing race-conscious action designed to "remedy" racial discrimination in the distant past.

The Eighth Circuit's decision in *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), is also factually distinguishable. *Valentine*, an employment discrimination case, involved a challenge by a white employee to an affirmative action hiring plan adopted by Arkansas State University shortly after OCR made informal determinations that vestiges of discrimination existed within Arkansas's higher education system. The Eighth Circuit upheld the plan, based in large part on its finding that a prior D.C. Circuit decision had found recent Title VI violations within Arkansas's higher education system.[22] *Valentine* lends no support to Petitioners' claims that 25-year-old OCR discrimination charges are sufficient to justify present-day remedial measures.

Palmer v. District Board of Trustees of St. Petersburg Junior College, 748 F.2d 595 (11th Cir. 1984), is the other federal appellate decision alleged by Petitioners to conflict with the Fourth Circuit's decision. *Palmer* is an employment discrimination case with very little factual similarity to the instant case. Indeed, the white plaintiff in that case stipulated that his employer's affirmative action hiring plan was "valid," and thus the Eleventh Circuit declined to address that question. *Palmer*, 748 F.2d at 600-601. In subsequent employment discrimination litigation, the Eleventh Circuit has subjected race-based "remedial" action to the same exacting scrutiny that the Fourth Circuit applied here. *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *In re Birmingham Re-*

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[22] In fact, the Eighth Circuit misread the D.C. Circuit decision, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)(*en banc*). *Adams* had made no finding one way or the other regarding Title VI violations in Arkansas; indeed, Arkansas was not even a party to the *Adams* litigation. Nonetheless, since the holding in *Valentine* is based on the erroneous finding that the D.C. Circuit had found Arkansas to be in violation of Title VI, the presence of that finding distinguishes *Valentine* from the instant case.

verse Discrimination Employment Litigation, 20 F.3d 1525 (11th Cir. 1994), *cert. denied sub nom., Martin v. Wilks*, ___ U.S. ___, 63 U.S.L.W. 3754 (April 17, 1995).

Petitioners also contend that the Fourth Circuit's decision is inconsistent with the U.S. Department of Education's (DOE) policy guidance regarding the application of Title VI to race-based college scholarships. *See* 59 Fed. Reg. 8956 (Feb. 23, 1994). That document speaks in generalities and does not indicate whether DOE believes that Title VI permits creation of a race-exclusive scholarship program given the factual record in this case. Any inconsistency between the DOE policy guidance (which purports to interpret existing law) and the Fourth Circuit's decision provides no basis for granting the Petition (S. Ct. R. 10.1); it would be merely an indication that the policy guidance is in need of revision.

Furthermore, DOE's interpretation of Title VI is of no relevance to two of Mr. Podberesky's three claims -- those arising under the Equal Protection Clause and 42 U.S.C. § 1981. Nor is DOE's interpretation of Title VI entitled to deference from the courts. The Court has held that the proscriptions of Title VI are largely coterminous with the proscriptions of the Equal Protection Clause with respect to the activities of a state or its agencies. *Fordice*, 112 S. Ct. at 2737-38 n.7; *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 590 (1983). Since a federal agency's interpretation of the Constitution is not entitled to deference from the courts (*Weinberger v. Salfi*, 422 U.S. 749 (1975)), there is no justification for courts to defer to a federal agency's interpretation of a statute that is coterminous with the Constitution.

IV. PETITIONERS HAVE NOT PROPERLY RAISED THE "DIVERSITY" ISSUE

The Kirwan Petitioners also seek review of the Fourth Circuit's decision based on their claim that the Banneker Program served UMCP's compelling interest in a racially

diverse student body. Kirwan Pet. 27-30. The "diversity" issue was not passed on by the Fourth Circuit and is not properly before the Court.

When Mr. Podberesky first sought summary judgment from the district court in 1991, the Kirwan Petitioners did not seek to defend the Banneker Program based on a "diversity" rationale. Rather, their sole defense was that the program was designed to overcome the effects of past UMCP racial discrimination. It was only after Mr. Podberesky appealed from the denial of his motion that UMCP for the first time raised the "diversity" rationale as an alternative defense. Accordingly, when the Fourth Circuit remanded the case to the district court in January 1992 for reconsideration of Mr. Podberesky's summary judgment motion, it quite rightly limited the remand to consideration of the "remedying past discrimination" defense. Pet. App. 107a-108a. Fed. R. Civ. P. 56 demands no less; a party that defends against a summary judgment motion based on one rationale may not avoid entry of judgment by raising an entirely new rationale after the initial rationale is rejected.

Were the Court nonetheless to agree to consider Petitioners' "diversity" defense, it would be forced to do so with very little guidance; none of the lower courts that have reviewed this case have passed directly on the "diversity" issue.[23] An issue raising such important constitutional questions (and which has not been directly addressed by the Court since its fractured decision in *Bakke* in 1978) should not be decided on such a thin record.

Moreover, the record is clear that a desire for "diversity" played no role in creation of the Banneker

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[23] Petitioners have only themselves to blame for that state of affairs. Even when the case came before the Fourth Circuit for the second time, Petitioners sought to avoid a ruling on the "diversity" issue. Rather, Petitioners advised the appeals court that should it reverse the district court, it should remand the case for consideration of the "diversity" issue in the first instance by the district court.

Program in 1978 and in its continuation in 1990 at the time that Mr. Podberesky sought to be considered for a scholarship.[24] "Diversity" only arose as an issue in response to this lawsuit. When a racial classification is challenged, a state may not defend its conduct based on just any rationale it can divine during litigation. Rather, the rationale advanced must be one that actually led to creation of the program. *Coral Construction Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992). Accordingly, while Petitioners are entitled to defend a new race-based scholarship program on a "diversity" rationale, they may not resist Mr. Podberesky's claims based on a rationale for the Banneker Program invented after suit was filed.

CONCLUSION

Respondent Daniel J. Podberesky respectfully requests that the Court deny the petitions for certiorari.

Respectfully submitted,

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[24] Indeed, Petitioner Kirwan stated earlier this month, "In neither scholarship program before [consolidation of the Banneker and Key programs] was diversity a specific [selection] criterion because the Banneker was for African Americans and the students getting the Key Scholarship have been a quite diverse group of people. . . . It was only when we combined the two pools that we have diversity as a criterion." *See* "Banneker's future affected by many," *The Diamondback* at 1 (April 13, 1995).